
(1919) 02 AHC CK 0032
In the Allahabad High Court

Nanak Chand and Another

APPELLANT

Vs

Chameli Kunwar

RESPONDENT

Date of Decision : 21-02-1919

Acts Referred:

Evidence Act, 1872 — Section 115

Citation : AIR 1919 All 231 : 50 Ind. Cas. 777

Hon'ble Judges : Henry Richards, C.J.; Rafique, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit which was brought to realise the amount of a mortgage. The facts appear to be that after the mortgage (which was usufructuary in form) was made, the mortgagee made a letting of the property which consisted of houses to the mortgagor. Rent fell into arrear the mortgagee brought a suit for the rent, obtained a decree and put up the houses for sale. They were purchased by the appellant here. When the present suit was instituted, it was contended on behalf of the appellant that he must be taken to have purchased the entire interest in the houses and that the plaintiff was not at liberty as against him to set up the mortgage. The finding of the Court below is that the defendant, who was the auction-purchaser, knew of the existence of the mortgage and purchased the property at a price which was far less than the value of the houses had they been free of incumbrances. It is contended on the authority of Muhammad Hamid-ud-din v. Shib Sahai 21 A. 309PC : A.W.N. (899) 87 : 9 Ind. Dec. (N.S.) 906 and certain other meanings that the appellant here must be deemed to have purchased the houses free from all incumbrances. We think that there is no force in this contention having regard to the finding of the Court below. It is admitted that if the simple money decree had been obtained by some person other than the mortgagee, it would only be the interest of the judgment-debtor that could be sold. The interest of the judgment-debtor was merely his equity of redemption (and his tenancy if the latter had any value.) It is said, however, that because the decree-holder happened to be the mortgagee,

the mortgagee after the sale is estopped from setting up his mortgage. If any question of estoppel arise it when tee under the provisions of Section 115 of the Evidence Act, which provides that When one person has by his declaration act or omission intentionally caused or premitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." We may concede for the purpose of argument that the omission to state at the time of the attachment of the property that, the decree-holder bad a mortgage thereon amounted to an "omission" within the meaning of this section, but it was necessary before deciding in favour of the defendant to find that by that "omission" the decree-holder had intentionally caused the auction-purchaser to believe that there was no mortgage on the property and had caused him to act upon that belief. In the present case the findings show that the auction-purchaser did not believe that there was no mortgage. On the contrary the finding is that he knew that there was a mortgage. The purchaser did not act on the belief that there was no mortgage. The finding is that he did not pay the full value of the houses. We think on the findings of fact arrived at, the decree of the Court below was quite correct. We dismiss the appeal.